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9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13
14 THE FACEBOOK, INC. and MARK
ZUCKERBERG,

15 Plaintiffs,

16 v.

17 CONNECTU, INC. (formerly known as
CONNECTU, LLC), PACIFIC
18 NORTHWEST SOFTWARE, INC.,
WINSTON WILLIAMS, and WAYNE
19 CHANG,

20 Defendants.
21

Case No. 5:07-CV-01389-JW

**JOINT CASE MANAGEMENT
CONFERENCE**

Date: June 23, 2008
Time: 10:00 A.M.
Judge: Honorable James Ware

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JOINT CMC STATEMENT
5:07-CV-01389-JW

1 **INTRODUCTION**

2 Plaintiffs' Position:

3 This Court has set a Case Management Conference for June 23, 2008. As a result of
4 mediation before Antonio Piazza on February 22 and 23, 2008, certain of the parties to this action
5 and the related Massachusetts actions¹ signed a Term Sheet and Settlement Agreement
6 ("Settlement Agreement"). The parties then jointly reported to the respective courts that the cases
7 had settled. The Term Sheet and Settlement Agreement is being challenged by ConnectU, Inc.
8 only. The remaining six parties in the two lawsuits have not joined ConnectU. Plaintiffs have
9 moved to have the Term Sheet and Settlement Agreement enforced. *See* Dkt. No. 329. That
10 hearing is set for June 23, 2008.

11 Defendants raise many arguments in this statement, some of which have been raised in
12 numerous pleadings filed in this action and the Massachusetts action in the last six weeks.
13 Plaintiffs will not respond here, as the CMC Statement is not an appropriate vehicle for argument.
14 Defendants also raise new arguments related to various parties' failure to join or challenge
15 Plaintiffs' Confidential Motion to enforce the Settlement Agreement. Plaintiffs are prepared to
16 address those arguments at the June 23 CMC, if the Court deems it necessary. Suffice it to say,
17 however, that all parties to this action and the Massachusetts action were represented at the
18 Mediation, were aware of and/or were served with the Confidential Motion, and could have
19 responded through counsel for record for all defendants in this action and all plaintiffs in the
20 Massachusetts action, Finnegan, Henderson, Farabow, Garrett and Dunner.

21 Defendant ConnectU's Position:

22 Contrary to Plaintiffs' statement, ConnectU's individual principals (who are parties in
23 Massachusetts) are not parties to this action, and have not retained Finnegan Henderson to

24

¹ The Massachusetts action was filed by ConnectU and its principals, Tyler Winklevoss, Cameron
25 Winklevoss and Divya Narendra against Facebook, Inc., Facebook LLC, Mark Zuckerberg and
26 other individuals associated with the founding of Facebook. ConnectU also filed an earlier case
27 in the District of Massachusetts, which was dismissed in March 2007. The First Circuit Court of
Appeals recently reversed and remanded that case, *see* 522 F.3d 82 (1st Cir. 2008), and Judge
Woodlock has indicated that it has been consolidated with the later-filed case in the District of
Massachusetts.

1 represent them in this case. Plaintiffs apparently have made no attempt to serve them or otherwise
2 require a formal response to Plaintiffs' current motion. ConnectU believes that they do in fact
3 oppose Plaintiffs' position. The Court should either deny the motion to enforce outright, or
4 require Plaintiffs to properly serve any party against whom Plaintiff seeks relief so that those
5 parties can, through counsel, object and submit relevant evidence in the form of additional briefs,
6 declarations, or hearings.

7 With respect to Plaintiffs' motion to enforce against ConnectU, the alleged settlement
8 agreement lacked crucial material terms and therefore was insufficient to establish a meeting of
9 the minds. Proffered experts and fact witnesses on each side differ sharply as to these issues.
10 Facebook's effort to force upon ConnectU a complex web of transactional documents under the
11 guise of "form and documentation" improperly converts discretion relating to form into unilateral
12 control over fundamental substance. Similarly, Facebook's emphasis on the fact that the one-and-
13 a-half page "Term Sheet and Settlement Agreement" (which Plaintiffs here insist on calling the
14 "Settlement Agreement," despite also attaching the voluminous other agreements to their motion)
15 recited that it was "binding" cannot rescue a deficient contract.

16 The complex set of documents (totaling over 100 pages) that Plaintiffs claim is either
17 "required" to be signed or "provide[s] guidance to the Court" contain material terms inconsistent
18 with and going far beyond the Term Sheet and Settlement Agreement. The relief sought by
19 Plaintiffs would require the Court to adjudicate the details and effectively write a contract that the
20 parties never agreed to for a complex corporate transaction, which Plaintiffs' own pleadings
21 inconsistently treat as either a merger or a stock purchase.

22 The Term Sheet and Settlement Agreement is also unenforceable because it was procured
23 by Facebook's fraud. Indeed, based on a formal valuation resolution approved by Facebook's
24 Board of Directors but concealed from ConnectU, the stock portion of the purported agreement is
25 worth only one-quarter of its apparent value based on Facebook's public press releases. Although
26 Facebook seeks to hide its actions behind asserted privilege claims (which it seeks to apply far
27 beyond any established boundaries), there is ample evidence to establish violations of federal
28 securities law and California common law of deceit. By federal statute and common law, such a

1 fraudulent contract is unenforceable and subject to rescission.

2 PNS Defendants' Position:

3 Defendants Pacific Northwest Software, Inc., Winston Williams and Wayne Chang (the
4 “PNS Defendants”) understand that The Facebook, Inc. (“Facebook”) is asserting that a writing
5 with which the PNS Defendants had no involvement may have an impact on this case. The PNS
6 Defendants further understand that Facebook has filed a motion regarding this writing. Without
7 having access to the writing, or being present when the writing was generated, the PNS
8 Defendants do not and cannot take any position regarding Facebook’s assertions regarding it.

9 **I. JURISDICTION AND SERVICE**

10 Plaintiffs' Position:

11 Plaintiffs contend that, as a result of the settlement of this case, this Court no longer has
12 subject matter jurisdiction over Plaintiffs’ claims, though it has jurisdiction to enforce the
13 Settlement Agreement. *Doi v. Halekulani Corp.*, 276 F.3d 1131, 1139 (9th Cir. 2002); *TNT*
14 *Marketing, Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986).

15 Defendant ConnectU's Position:

16 The alleged settlement agreement is unenforceable and was procured through fraud. The
17 Court’s subject matter jurisdiction regarding this matter remains unchanged. Plaintiffs have
18 failed to serve and join parties whose presence is necessary to enforce the terms of the alleged
19 settlement that Plaintiffs seek.

20 **II. FACTS**

21 Plaintiffs' Position:

22 Other than the Term Sheet and Settlement Agreement, Plaintiffs believe the facts of the
23 underlying dispute are irrelevant. The Parties believe that the issues, facts, and parties have been
24 presented in detail in other pleadings. Plaintiffs assert that that many of the key facts are set forth
25 in currently pending summary judgment motion, which was pending at the time the parties. Dkt.
26 No. 251.

27 Defendants' Position:

1 ConnectU's position is that the alleged settlement agreement is unenforceable and was
2 procured through fraud, as presented in detail in the pending motions filed since April 23, 2008.
3 With respect to the underlying dispute, Defendants dispute that Plaintiffs' pending motion for
4 summary judgment accurately sets forth the facts, many of which are also subject to open
5 discovery requests and disputes.

6 **III. LEGAL ISSUES**

7 Plaintiffs' Position:

8 1. Did the parties enter into a binding and enforceable Settlement Agreement through
9 which all pending litigation (including this action) was resolved and dismissed with
10 prejudice? If so, there are no additional legal issues to resolve.

11 Defendant ConnectU's Position:

12 1. Whether the handwritten 1½-page Term Sheet and Settlement Agreement executed on
13 February 23, 2008 is unenforceable because it is ambiguous and omits material terms,
14 and because the documents Plaintiffs proffer for enforcement of the alleged settlement
15 contain terms that materially change the Term Sheet and Settlement Agreement.

16 2. Whether the Term Sheet and Settlement Agreement is unenforceable and subject to
17 rescission because it was procured through federal securities fraud or common law
18 fraud.

19 3. Whether evidence concerning communications between the Parties and their
20 representatives is discoverable and admissible to support ConnectU's contract and
21 fraud defenses despite Plaintiffs' claims of privilege.

22 The Parties agree that if there is no enforceable settlement agreement, the following issues
23 will need to be resolved:

24 a. Did Defendants violate California Penal Code § 502(c)?
25 b. Did Defendants engage in common law misappropriation/unfair
26 competition?
27 c. Did Defendants violate Massachusetts General Law § 93A?
28 d. Did defendants violate the CAN SPAM Act, 15 U.S.C. § 7704?

1 e. Did defendants violate the Computer Fraud and Abuse Act, 18 U.S.C.
2 § 1030?

3 f. What damages, if any, are available to Defendants in the event a claim is
4 successful?

5 g. Do one or more of the affirmative defenses in Defendants' Answer bar any
6 or all of Plaintiffs' claims?

7 h. In light of the discovery Plaintiffs produced as a result of an order
8 compelling such production, should Defendants be entitled to amend their
9 answer to assert affirmative counterclaims?

10 **IV. MOTIONS**

11 **Resolved Motions.**

12 1. Defendant ConnectU filed a Demurrer on October 25, 2005; the demurrer was
13 overruled.

14 2. Cameron Winklevoss, Tyler Winklevoss, Divya Narendra, Howard Winklevoss, filed
15 a Motion to Quash because the Court lacked personal jurisdiction on October 25, 2005, which
16 was granted.

17 3. Defendant ConnectU filed a Motion to Stay on September 6, 2006, which was denied.

18 4. Both parties filed various motions to compel discovery in Superior Court, prior to this
19 case's removal to this Court. Facebook's motion to compel further responses to document
20 requests was pending at the time ConnectU removed this action to this Court.

21 5. Facebook filed a Motion for Leave to File a First Amended Complaint on January 23,
22 2007, which was granted.

23 6. ConnectU filed a Motion to Dismiss pursuant to Federal Rule 12(b)(6) on March 21,
24 2007, which was granted-in-part.

25 7. Facebook filed, on April 4, 2007, a Local Rule 6-3 motion to enlarge the time required
26 for it to respond to Pacific Northwest Software and Williams' Motion to Dismiss, which was
27 granted.

1 8. Facebook filed a Motion for Expedited Discovery on April 5, 2007, which was
2 granted. Facebook filed, on April 9, 2007, a Motion to Reschedule the June 20, 2007, CMC,
3 which was denied.

4 9. ConnectU filed, on June 5, 2007, a Local Rule 6-3 motion to enlarge time to respond
5 to the Second Amended Complaint, which was granted-in-part.

6 10. Plaintiffs filed a Motion to Strike the Affirmative Defenses of ConnectU, Inc. on July
7 10, 2007, which this Court denied on August 14, 2007.

8 11. Defendants Pacific Northwest Software and Winston Williams filed a Motion to
9 Dismiss for Lack of Personal Jurisdiction on March 21, 2007, which was denied on August 13,
10 2007.

11 12. Plaintiffs filed a Motion for Sanctions on August 22, 2007, which the Court denied on
12 November 30, 2007.

13 13. Defendants Winklevoss and Narendra filed a Motion to Dismiss on September 5,
14 2007, which was granted on November 30, 2007.

15 14. Plaintiffs filed a Motion to Compel Defendants Pacific Northwest Software and
16 Winston Williams to Provide further Responses to Interrogatories Nos. 3-4, which this Court
17 granted on December 12, 2007.

18 15. On December 18, 2007, Finnegan, Henderson, Farabow, Garrett & Dunner
19 (“Finnegan”) filed a Motion to Withdraw as Counsel for Defendant Winston Williams, setting the
20 matter for hearing on January 23, 2008. Plaintiffs responded to this motion on January 2, 2008.
21 The same day, Williams executed a declaration, which was not received by Plaintiffs until
22 January 5, 2008. On January 7, 2008, Plaintiffs advised the Court of the Declaration, and
23 indicated that they may seek remedial relief as a result of their filing an unnecessary Response to
24 the Motion. Later in the day on January 7, 2008, Finnegan withdrew the Motion to Withdraw.

25 16. Finnegan filed, on December 18, 2007, a Local Rule 6-3 motion to shorten time to
26 withdraw as counsel for Defendant Winston Williams, which this Court denied on December 21,
27 2007.

1 17. On January 10, 2008, Defendants filed a Motion Pursuant to Fed.R.Civ. P. 56(f)
2 regarding Plaintiffs' Motion for Partial Summary Judgment, which has been set for hearing on
3 February 20, 2008.

4 18. On January 10, 2008, Defendants filed a Civil L.R. 6-3 application to enlarge the
5 briefing time for the opposition to Plaintiffs' Motion for Partial Summary Judgment. The Court
6 denied this motion.

7 19. On May 9, 2008, Plaintiffs filed an Administrative Request to reschedule the hearing
8 on their Confidential Motion. The proposed date passed without Order by the Court.

9 20. On May 16, 2008, Plaintiffs filed an Administrative Request for leave to file a Reply,
10 which the Court denied on June 10, 2008.

11 21. On June 10, 2008, the Court entered an Order stating: "Defendants' Motion to Shorten
12 Time for Hearing, and Motion to Expedite Discovery is DENIED. (Docket Item No. 374)." Docket
13 No. 374, filed May 19, 2008, refers to the following motions: ConnectU's Motion for
14 Expedited Discovery and Evidentiary Hearing, and ConnectU's Motion to Shorten Time.

15 22. On May 23, 2008, Defendant ConnectU filed a Motion to Reschedule the June 23,
16 2008, hearing on Plaintiffs' Confidential Motion. The Motion to Reschedule was denied on June
17 10, 2008.

18 **Motions Pending at the Time of the February 22, 2008 Mediation**

19 1. On January 7, 2008, Plaintiffs filed a Motion for Partial Summary Judgment Re
20 Defendants' Liability Pursuant to California Penal Code Section 502(c) and 15 U.S.C.
21 § 7704(a)(1) and 15 U.S.C. § 7704(b)(1), which was noticed for hearing on February 27, 2008.
22 The Motion was taken off calendar on February 25, 2008 after the conclusion of the mediation
23 session.

24 2. On January 7, 2008, Plaintiffs filed a Motion to Seal Portions of Their Motion for
25 Partial Summary Judgment Re Defendants' Liability Pursuant to California Penal Code Section
26 502(c) and 15 U.S.C. § 7704(a)(1) and 15 U.S.C. § 7704(b)(1), the Declaration of Chris Shiflett
27 in Support Thereof Including Exhibits 1-3; and Exhibits 1, 2 and 4 to the Declaration of Monte

1 M.F. Cooper in Support Thereof. This motion originally was noticed for hearing on February 27,
2 2008. The Motion was taken off calendar on February 25, 2008.

3 3. On January 23, 2008 Plaintiffs filed a Motion to Compel Compliance by
4 Defendants Pacific Northwest Software and Winston Williams with Order Granting Motion to
5 Compel Supplemental Interrogatory Responses, which was noticed for hearing on February 27,
6 2008. The Motion was taken off calendar on February 25, 2008.

7 **Pending Motions**

8 1. On April 23, 2008, Plaintiffs filed a Confidential Motion to enforce what Plaintiffs
9 characterize as the Settlement Agreement. Dkt. No. 329.

10 2. On May 19, 2008, non-parties Greg Roussel, Esq. and Fenwick & West LLP
11 ("Fenwick") filed a Motion to Quash and for Protective Order. Dkt. No. 378.

12 3. The parties disagree as to the import of the Court's Order of June 10, 2008 which
13 denied Docket No. 374. The Order says the Court denied ConnectU's Motion to Shorten Time
14 for Hearing, and Motion to Expedite Discovery. The complete title of that motion is a Motion for
15 Expedited Discovery and Evidentiary Hearing. The hearing date has been vacated. Plaintiffs
16 read the Order, and the Court's termination of the hearing, to mean that the entire Motion was
17 denied, including to the extent it seeks an evidentiary hearing. ConnectU's position is that the
18 Court's June 10 Order did not address ConnectU's Motion for Evidentiary Hearing on Plaintiffs'
19 motion to enforce, which was contained in the same Motion papers encompassed by Docket Item
Number 374.

20 4. On June 9, 2008, Plaintiffs filed Objections to and Motion to Strike Evidence
21 Submitted in ConnectU's Opposition to Plaintiffs' motion to enforce. Dkt No. 424. ConnectU is
22 preparing an opposition to this motion.

23 5. Several Administrative Requests to Seal were pending before the Term Sheet and
24 Settlement Agreement was signed and more are currently pending. On June 10, 2008, the parties
25 submitted a Joint Proposed Order to resolve those motions (Docket No. 429), which include
26 Docket Numbers: 246, 255, 274, 302, 313, 321, 328, 333, 355, 360, 368, 371, 376, 383, 393, 401,
27 404, 409, 415, 425, and 426.

With regard to the sealing issues, Defendants request that the Court direct the parties make a proposal to limit materials filed under seal. Defendants reserve and do not waive their right to seek the de-designation of information that is not confidential. Defendants contend that Plaintiffs have not met their burden of showing that *all* of the information found in Plaintiffs' motion to enforce and supporting papers, and *all* of the information found in the Related Motions should be filed under seal.

Anticipated Motions

Plaintiffs' Position:

This case settled as a result of mediation on February 23, 2008. Plaintiffs anticipate filing a Motion for Attorneys' Fees and Costs, as well as a Motion to Disqualify Finnegan, Henderson, Farabow, Garrett & Dunner.

Defendant ConnectU's Position:

1. ConnectU anticipates filing a motion to dismiss Plaintiffs' motion to enforce on the ground that Plaintiffs have failed to serve and join necessary parties.

2. ConnectU anticipates filing a motion to compel the discovery requested from Facebook relating to enforcement of and defenses to Plaintiffs' motion to enforce.

3. ConnectU may file a motion to compel the production of certain electronically stored instant message logs that ConnectU learned only four weeks ago that Plaintiff Zuckerberg has intentionally withheld from production for several years. A computer forensics consultant (Jeff Parmet & Associates) found these instant message logs on Zuckerberg's hard drive and identified them to Zuckerberg and Facebook as highly material evidence on December 14, 2007, more than two months prior to the mediation and 2½ years after they were first requested in the Massachusetts action. Although Facebook and Zuckerberg told Parmet they would produce the documents, they failed to do so, and have refused to disclose to ConnectU the subject of Parmet's discovery.

ConnectU's counsel first learned of the materiality of the Zuckerberg instant messages on May 14, 2008 and promptly raised the issue with Judge Douglas P. Woodlock in the Massachusetts action, who had entered an order relating to the Parmet forensic review. Although

the Zuckerberg instant messages are believed to relate primarily to the Massachusetts action,
1 Judge Woodlock left it to this Court to decide if such documents should be reviewed *in camera*,
2 whether they should be produced to ConnectU, and whether the failure to timely produce them is
3 relevant to the validity of the alleged settlement of this action and the Massachusetts action.
4 Following a hearing on June 2, 2008, Judge Woodlock ordered the Massachusetts Court Clerk to
5 transmit to this Court Judge Woodlock's Memorandum and Order dated June 3, 2008 and a
6 transcript of the June 2, 2008 hearing. The Memorandum and Order stated (at 3-4):
7

I received from Mr. Parmet a three ring binder of hard copies of various
8 documents that he contended had not yet been produced by Facebook when
discovery in the case had been stayed I have not reviewed the documents but
9 will keep them under seal pending further developments in the disputes between
the parties I stand ready, of course, to provide whatever assistance Judge
10 Ware considers helpful.

The Massachusetts Court transmitted the Order and transcript on June 11, 2008. On June 6, 2008,
11 ConnectU served Plaintiffs with requests to produce the Zuckerberg documents in this action,
12 although they had been requested in the Massachusetts action in mid-2005. If Plaintiffs object,
13 ConnectU anticipates moving to compel and asking this Court to obtain the Zuckerberg
14 documents from the District of Massachusetts, review them, and order production.
15

16 V. **AMENDMENT OF PLEADINGS**

17 Plaintiffs' Position: This case settled as a result of mediation on February 23, 2008.
18 Plaintiffs do not anticipate amending their pleadings.

19 Defendant ConnectU's Position:

20 The alleged settlement agreement is unenforceable and was procured through fraud.
21 Plaintiffs' motion to enforce an alleged settlement agreement is treated as "a separate contract
22 dispute." *O'Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995); *Adams v. Johns-Manville Corp.*,
23 876 F.2d 702, 709 (9th Cir. 1989) ("The motion to enforce the settlement agreement essentially is
24 an action to specifically enforce a contract.").
25

1 **VI. EVIDENCE PRESERVATION**

2 Plaintiffs' Position: This case settled as a result of mediation on February 23, 2008. This
3 issue is now irrelevant.

4 Defendant ConnectU's Position:

5 The alleged settlement agreement is unenforceable and was procured through fraud.
6 Preservation and production of the documents requested from Facebook and its counsel, as well
7 as the Parmet documents, *see IV supra*, relates to enforceability of the alleged settlement.

8 **VII. INITIAL DISCLOSURES**

9 Plaintiffs' Position:

10 Due to settlement, no initial disclosures are necessary. Prior to settlement, Plaintiffs
11 suggested that initial disclosures be served promptly after the CMC hearing.

12 Defendant ConnectU's Position:

13 The alleged settlement agreement is unenforceable and was procured through fraud.
14 Defendants will be prepared to discuss the timing of initial disclosures at the Court's
15 convenience.

16 **VIII. DISCOVERY**

17 Plaintiffs' Position: This case is settled and no further discovery should occur. At the
18 time of settlement, the primary remaining issue was the number of false emails sent to stolen
19 email addresses. Plaintiffs had pending a Motion to Compel Compliance with the Court's
20 December 12, 2007 Order. Dkt. No. 234. Further, by Order dated February 5, 2008 [Dkt. No.
21 288], the Court had ordered the parties no later than February 26, 2008 to meet-and-confer on all
22 outstanding discovery disputes and scheduling issues, and to agree to a deposition schedule. The
23 meeting of counsel required by the Court Order was scheduled to occur on February 25, 2008.
24 However, it was never held, as on February 25, 2008, counsel for Plaintiffs and counsel for all
25 Defendants (including ConnectU) jointly contacted the Court to notify it that a settlement had
been reached and that all pending motions should be taken off calendar.

26 Defendants' Position:

27 The alleged settlement agreement is unenforceable and was procured through fraud. The
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1 parties notified the courts in late February and early March 2008 not that an agreement had been
2 reached, but instead of what Plaintiffs' counsel described as a "tentative" settlement, subject to
3 reaching "final" agreement. In order to defend against Plaintiffs' motion to enforce, on May 8,
4 2008, ConnectU served document requests and a Rule 30(b)(6) deposition notice, seeking
5 discovery relating to enforcement of and defenses to Plaintiffs' motion to enforce. Plaintiffs have
6 objected and ConnectU anticipates filing a motion to compel. On May 9, 2008, ConnectU served
7 subpoenas on Fenwick seeking documents and a deposition of Mr. Roussel relating to
8 enforcement of and defenses to Plaintiffs' motion to enforce. On May 19, 2008, Fenwick filed a
9 Motion to Quash and for Protective Order. On June 6, 2008, ConnectU served Plaintiffs with
10 production requests for the Parmet documents.

11 In the underlying actions, much discovery remains to be completed. Given the protracted
12 pleading activities occasioned by the complaint and two separate amendments to the complaint
13 that have been filed in this case, including Plaintiffs' inappropriate efforts to re-name parties that
14 the Superior Court had previously dismissed, it was unclear until recently which causes of action
15 would remain, and which parties would remain in the case. Defendants' efforts to conduct
16 discovery were stalled because Plaintiffs continued to refuse to complete document production
17 pursuant to document requests propounded in August 2007. Defendants currently expect to take
18 several depositions regarding the documents and hard drives produced in late 2007 and others
19 relating to the Parmet documents. Defendants expect to notice additional Rule 30(b)(6)
20 depositions and at least two non-party depositions. Defendants also anticipate propounding at
least one additional document demand, and at least one set of Requests for Admission.

21 **A. Fact and Expert Depositions**

22 Plaintiffs' Position: No further fact and expert depositions are necessary due to the
23 settlement. Prior to settlement, the Court issued a Case Management Schedule in which it set
24 deadlines for fact and expert discovery. Dkt. No. 270. Further, by Order dated February 5, 2008
25 [Dkt. No. 288], the Court had ordered the parties no later than February 26, 2008 to meet-and-
26 confer on all outstanding discovery disputes and scheduling issues, and to agree to a deposition
27 schedule of all remaining witnesses who needed to be deposed. The meeting of counsel required
28

1 by the Court Order was scheduled to occur on February 25, 2008. However, it was never held, as
2 on February 25, 2008, counsel for Plaintiffs and counsel for all Defendants (including ConnectU)
3 jointly contacted the Court to notify it that a settlement had been reached and that all pending
motions should be taken off calendar.

4 **Defendants' Position:**

5 The alleged settlement agreement is unenforceable and was procured through fraud. The
6 parties notified the courts in late February and early March 2008 not that an agreement had been
7 reached, but instead of what Plaintiffs' counsel described as a "tentative" settlement, subject to
8 reaching "final" agreement. Defendants' position on discovery is set forth above.

9 **B. Interrogatories**

10 **Plaintiffs' Position:** Prior to settlement, the Court issued a Case Management Schedule in
11 which it set deadlines for fact and expert discovery. Dkt. No. 270.

12 **Defendants' Position:**

13 The alleged settlement agreement is unenforceable and was procured through fraud.
14 Defendants' position on discovery is set forth above.

15 **C. Requests for Admissions**

16 **Plaintiffs' Position:** Prior to settlement, the parties agreed that the Federal Rules of Civil
17 Procedure shall govern Requests for Admission.

18 **Defendants' Position:**

19 The alleged settlement agreement is unenforceable and was procured through fraud. The
20 parties agree that the Federal Rules of Civil Procedure shall govern Requests for Admission.
21 Defendants' position on discovery is set forth above.

22 **D. Requests For Production**

23 **Plaintiffs' Position:** No further document production is necessary to the settlement. Prior
24 to settlement, the parties agreed that the Federal Rules of Civil Procedure would govern Requests
25 for Production of Documents and Things. Document collection from Defendants PNS, Williams
26 and Chang remained deficient.

27 **Defendants' Position:**

1 The alleged settlement agreement is unenforceable and was procured through fraud.
2 Defendants' position on discovery is set forth above.

3 **E. Protective Order**

4 Plaintiffs' Position:

5 Prior to settlement, the Court had ordered the parties to prepare a new Stipulated
6 Protective Order. One was prepared by counsel for Plaintiffs and forwarded to counsel for
7 Defendants. Defendants never responded. The case then settled. The parties have, however,
8 been operating pursuant to the Stipulated Protective Order entered into while the case was
9 pending in Superior Court.

10 Defendants' Position:

11 The alleged settlement agreement is unenforceable and was procured through fraud. The
12 parties have been operating consistent with Local Rule 79-5.

13 **F. Electronic Mail Service**

14 Plaintiffs' Position: Prior to settlement, plaintiffs proposed that in addition to service by
15 mail, the parties also must provide copies by electronic mail of any discovery request, discovery
16 response, subpoena, pleading, or the like.

17 Defendants' Position:

18 The alleged settlement agreement is unenforceable and was procured through fraud.
19 Service should be effected through any method authorized pursuant to the Federal and Local
20 Rules.

21 **G. Meet-and-Confer Deadline**

22 Plaintiffs' Position: No meet and confer is necessary due to settlement. Prior to
23 settlement, Plaintiffs proposed that all meet-and-confer conferences required by Federal Rule 37
24 and/or the Local Civil Rules must occur within five business days of the demand. Plaintiffs make
25 such a proposal because to date, Defendants have required at least two weeks to conduct every
26 single meet-and-confer associated with discovery disputes, resulting in unnecessary and
27 prejudicial delay.

28 Defendants' Position:

1 The alleged settlement agreement is unenforceable and was procured through fraud.
2 Conferences should occur within a reasonable time in light of customary courtesies among
3 counsel.

4 **IX. CLASS ACTIONS**

5 This is not a class action.

6 **X. RELATED CASES**

7 The Parties are aware of two cases related to this action: *ConnectU Inc. v. Mark*
8 *Zuckerberg et al.*, No. 04-11923 (D.Mass) and *ConnectU LLC v. Mark Zuckerberg et al.*, No. 07-
9 10593 (D. Mass). The Court of Appeals for the First Circuit recently reversed the dismissal of
10 Civil Action No. 07-10593 and remanded for further proceedings. *See* 522 F.3d 82 (1st Cir.
11 2008). The District of Massachusetts has consolidated these two cases.

12 **XI. RELIEF**

13 Plaintiffs' Position: Plaintiffs seek an order enforcing the Settlement Agreement. Prior to
14 settlement, Plaintiffs sought judgment against Defendants including various forms of general,
15 punitive and statutory damages², disgorgement by Defendants, pre- and post- judgment interest;
16 injunctive relief, and attorneys' fees and costs. Assuming that at least 3 million email addresses
17 were sent unsolicited emails with false header information and that the email addresses were
18 harvested by automated means, plaintiff seeks statutory damages of at least \$900 million under
19 the CAN-SPAM Act., 15 U.S.C. § 7706(g).

20 Defendants' Position:

21 Defendants seek their costs and other appropriate relief for the filing of this frivolous
22 action. ConnectU's position is that Plaintiffs' motion to enforce the alleged settlement should be
23 denied because the alleged settlement agreement is unenforceable and was procured by fraud.

24

25 ² Plaintiffs seek damages including: Compensatory damages pursuant to California Penal Code §
26 502(e)(1) and 18 U.S.C. § 1030 (a)(4) for costs of responding to Defendants' actions; exemplary
27 damages under California Civil Code § 3426.3(c), punitive damages under California Penal Code
28 § 502(e)(4) (exemplary or punitive damages), economic damages under 18 U.S.C. § 1030
 (a)(5)(B)(i); statutory damages under 15 U.S.C. § 7706(g), *et seq.*; and aggravated damages under
 15 U.S.C. § 7706(g), including treble and general damages.

1 **XII. SETTLEMENT AND ADR**

2 Plaintiffs' Position:

3 The parties participated in mediation before Antonio Piazza on February 22 and 23, 2008.
4 As a result of that mediation, the parties signed a binding Settlement Agreement. Defendant
5 ConnectU is challenging the Term Sheet and Settlement Agreement, though no other defendant
6 is.

7 Plaintiffs have suggested that the parties participate in a settlement conference before
8 Judge Spero and asked that the Court refer the parties accordingly.

9 Defendant ConnectU's Position:

10 The alleged settlement agreement is unenforceable and was procured through fraud.
11 ConnectU is amenable to participate in a settlement conference before Judge Spero.

12 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

13 The parties consented to proceed before Magistrate Judge Seeborg for all purposes in this
14 matter. However, after issuing an order reassigning this case to a Magistrate Judge, the Court
15 vacated that order. Further, Magistrate Judges Seeborg and Trumbull have recused themselves,
16 and the parties expect Magistrate Judge Lloyd is likely to do the same.

17 **XIV. OTHER REFERENCES**

18 Plaintiffs contend that this case is settled, but continue to believe that a settlement
19 conference may be useful. Defendant ConnectU contends that the alleged settlement agreement
20 is unenforceable and was procured through fraud, but is amenable to participate in a settlement
21 conference before Judge Spero. The Parties do not believe that this case is suitable for reference
22 to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

23 **XV. NARROWING OF ISSUES**

24 Plaintiffs' Position: Other than enforcing the Settlement Agreement, no other narrowing
25 is necessary. Prior to settlement, much of the discovery in this case had already taken place in
26 related cases and before this action was removed to this Court. Plaintiffs believe summary
27 judgment would have significantly narrowed the issues in this case. That motion was set for
28 hearing on February 27, 2008, but was taken off calendar.

1 Defendants' Position:

2 It is ConnectU's position that the alleged settlement agreement is unenforceable and was
3 procured by fraud. With respect to the underlying litigation, there are outstanding document
4 requests to Plaintiffs. Once Plaintiffs produce all responsive documents to outstanding discovery
5 requests, Defendants anticipate taking depositions and thereafter opposing Plaintiffs' summary
6 judgment motion and seeking summary judgment themselves.

7 **XVI. EXPEDITED SCHEDULES**

8 Plaintiffs' Position: Prior to settlement, the Court had issued a Case Scheduling Order,
9 which provided for a November 17, 2008, trial date. Dkt. No. ____.

10 Defendants' Position:

11 ConnectU is seeking discovery relating to its defenses to Plaintiffs' motion to enforce the
12 alleged settlement, and respectfully requests, if the motion to enforce is not denied on the papers
13 or resolved based on the June 23 hearing, that a schedule be established for such discovery
14 (including resolution of any discovery disputes) that will enable discovery to be completed prior
15 to the date of an evidentiary hearing on Plaintiffs' motion to enforce. *See XVII infra.*

16 **XVII. SCHEDULING**

17 Plaintiffs' Position:

18 Plaintiffs' position is that this case is settled and, as a result, no schedule is necessary. To
19 the extent the Court disagrees, Plaintiffs propose that the original schedule be reinstated with an
20 adjustment to account for the four month delay imposed by Defendants.

21 Defendant ConnectU's Position:

22 Any delay in this matter has resulted from Plaintiffs' efforts to enforce an alleged
23 settlement agreement that is unenforceable and was procured through fraud. ConnectU requests
24 that if Plaintiffs' motion to enforce is not denied on the papers, the Court continue the June 23,
25 2008 hearing on the motion to enforce to enable ConnectU to obtain the discovery it is seeking
26 relating to its defenses, including resolution of any discovery disputes. ConnectU requests that
27 the Court set a deadline for discovery of August 31, 2008 and set an evidentiary hearing as soon

thereafter as convenient for the Court.

The chart below reflects the respective positions of the parties regarding a schedule for the case should Plaintiffs' motion to enforce be denied.

	Plaintiffs' Position	Defendants' Position
Fact Discovery Cut-off	January 30, 2009	January 30, 2009
Expert Reports	December 15, 2008	February 28, 2009
Rebuttal Expert Reports	December 31, 2008	March 31, 2009
Expert Discovery Cutoff	January 30, 2009	April 30, 2009
Last Day to Hear Dispositive Motions	February 15, 2009	May 15, 2009
Pre-trial Hearing	April 5, 2009	June 1, 2009
Trial	April 17, 2009	June 15, 2009

XVIII. TRIAL

Plaintiffs' Position:

Prior to settlement, Plaintiffs sought a jury trial. Given the number of claims and defendants, Plaintiffs anticipated a trial length of two weeks.

Defendant ConnectU's Position:

The alleged settlement agreement is unenforceable and was procured through fraud. ConnectU anticipates that it will take approximately a week for the presentation of its direct evidence at trial.

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES AND PERSONS

Pursuant to Civil L.R. 3-16, Plaintiffs and Defendants certify that as of this date, other than the named parties, there is no such interest to report. See Dkt. Nos. 20, 32.

1 Dated: June 13, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

2 _____
3 /s/ I. Neel Chatterjee /s/
4 I. Neel Chatterjee
5 Attorneys for Plaintiffs
6 Facebook, Inc. and Mark Zuckerberg

5 Dated: June 13, 2008

6 FINNEGAN, HENDERSON, FARABOW,
7 GARRETT, & DUNNER, LLP

8 _____
9 /s/ Scott R. Mosko /s/
10 Scott R. Mosko
11 Attorneys for Defendants Pacific Northwest
12 Software, Wayne Chang, and Winston Williams

13 Dated: June 13, 2008

14 BOIES, SCHILLER AND FLEXNER LLP

15 _____
16 /s/ Steven C. Holtzman /s/
17 Steven C. Holtzman
18 Attorneys for Defendant
19 ConnectU, Inc.

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on June 13, 2008.

Dated: June 13, 2008.

Respectfully submitted,

/s/ I. Neel Chatterjee /s/
I. Neel Chatterjee

Filer's Attestation: Pursuant to General Order No. 45, §X(B), I attest under penalty of perjury that concurrence in the filing of the document has been obtained from its signatory.

Dated: June 13, 2008

Respectfully submitted,

/s/ I. Neel Chatterjee /s/
I. Neel Chatterjee